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## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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No. 366

THE UNITED STATES, PETITIONER

vs.

BROOKS-CALLAWAY COMPANY

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1942

CERTIORARI GRANTED OCTOBER 19, 1942

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1942**

**No. 366**

**THE UNITED STATES, PETITIONER**

**vs.**

**BROOKS-CALLAWAY COMPANY**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF  
CLAIMS**

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IN THE COURT OF CLAIMS

No. 44809

BROOKS-CALLAWAY COMPANY

v.

THE UNITED STATES

I. *Petition*

(Filed August 26, 1939)

*To the Honorable the Court of Claims:*

The plaintiff, Brooks-Callaway Company, respectfully represents:

I. It is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business in the City of Atlanta, in the State of Georgia. At the times hereinafter mentioned, it was engaged in general construction work.

II. On October 12, 1931, plaintiff entered into a contract with defendant through the War Department, wherein plaintiff agreed to —

“furnish all labor and materials, and perform all work required for the construction of Item R. 848, Missouri Bend Levee, Lots A, B, & C, containing approximately two million three hundred thousand (2,300,000) cubic yards, situated in the Atchafalaya Front Levee District, and Item L. 868, St. Gabriel Levee, Lots A, B, & C, containing approximately one million seven hundred fifty thousand (1,750,000) cubic yards, situated in the Pontchartrain Levee District, for the consideration of Twelve (12) cents per cubic yard, place measurement, in strict accordance with the specifications, schedules, and drawings, \* \* \*”

Paragraph 3 of the specifications provided that for each item of work, liquidated damages for delay would be at the rate of \$20.00 per day for each calendar day of delay.

Paragraph 39 of the specifications provided that each item of work should be completed within 450 calendar days after the date of receipt of notice to proceed.

A true and correct copy of the pertinent portions of said contract and specifications is attached hereto, made a part hereof, and marked Exhibit “A.”

III. Notice to proceed was received October 22, 1931, thereby fixing January 14, 1933, as the date for completion of each section of the levees.

IV. Sections A and B of the Missouri Bend Levee were completed within the contract time, but Section C of said levee was not completed until March 22, 1933, 67 days after the contract completion date. Liquidated damages were deducted from payments otherwise due plaintiff for 67 days at the rate of \$20.00 per day, or in the sum of \$1,340.00. Plaintiff was delayed 112 days on account of high water during the construction of Section A of said levee, which delay in turn postponed commencement of work in Section C for a similar period. But for the delay caused by high water, Section C of the Missouri Bend Levee would have been completed prior to the contract completion date.

3 V. Sections A and B of the St. Gabriel Levee were completed within the contract time, but due to causes ~~set out~~ hereinafter in paragraphs VI, VII and VIII of this petition, Section C of said levee was not completed until August 25, 1933, 223 days after the contract completion date. Liquidated damages were deducted from payments otherwise due plaintiff for 223 days at the rate of \$20.00 per day, or in the sum of \$4,460.00.

VI. Prior to the contract completion date, plaintiff was delayed 166 days in the completion of Section C of the St. Gabriel Levee by reason of high water.

VII. Due to an injunction suit restraining the Levee Board from furnishing the right-of-way for Section C of the St. Gabriel Levee, plaintiff was unable to commence work in said section until late in the year 1932. As a result of said delay, plaintiff was forced to abandon its plan of operations which contemplated that the low sections of the levee should be constructed first since they would be the first to be affected by high water. But for the delay in securing the right-of-way for said Section C, and the resultant disruption of plaintiff's plan of operations, the St. Gabriel Levee would have been completed prior to the contract completion date.

VIII. The St. Gabriel Levee was located on the river side of the old levee from which plaintiff was permitted to take materials for construction of the new levee. In early January, 1933, work on Section C of the St. Gabriel Levee was completed except for a distance of approximately 1,000 feet. At this time the area engineer, in anticipation of high water, directed plaintiff to construct a temporary tie-in levee to a point in the old levee approximately 400 feet distant from the completed portion of the new levee. Plaintiff requested permission to build a tie-in levee  
4 along the bed of the new levee in order that the remaining

1,000 feet of said new levee could be completed without delay. This request was denied, whereupon plaintiff constructed the tie-in levee as directed. There was no high water until April 1933, and not until August of the same year did weather conditions permit plaintiff to resume work on completion of the St. Gabriel Levee. Had plaintiff been permitted to construct the tie-in levee along the bed of the new levee, as requested, Section C of the St. Gabriel Levee would have been completed within the contract time.

IX. On August 31, 1933, plaintiff submitted to the contracting officer a claim for remission of liquidated damages. In said claim plaintiff contended that the delay in completion of the contract was due to no fault of its own, but was caused by high water, the delay in securing the right-of-way for Section C of the St. Gabriel Levee, and the delay incident to being compelled to construct the tie-in levee in said Section C. By letter dated February 17, 1934, the contracting officer notified plaintiff that its claim had been forwarded to the General Accounting Office with recommendations. No copy of any recommendation which the contracting officer may have made with reference to said claim has ever been forwarded to plaintiff.

X. On April 10, 1934, the Comptroller General ruled that plaintiff was entitled to remission of liquidated damages in the sum of \$1,900.00. The Comptroller General stated that the contracting officer had found that with respect to Section C of the Missouri Bend Levee there was a delay of 112 days due to high water during the contract period, that the normal expected delay on account of high water during said period was 83 days, and that thus there was an excusable delay of 29 days in the completion of said Section C. The Comptroller General also stated that with respect to the delay in the completion of Section C of the St. Gabriel Levee, the contracting officer had found that there was a delay of 166 days on account of high water, of which 100 days were considered foreseeable. Upon these recommendations, the Comptroller General ruled that plaintiff was entitled to remission of liquidated damages for 29 days of unforeseeable high water in the case of Section C of the Missouri Bend Levee, and for 66 days of unforeseeable high water with respect to Section C of the St. Gabriel Levee. The Comptroller General refused to remit liquidated damages for the delay arising from the injunction suit with respect to Section C of the St. Gabriel Levee, basing his decision on the statement that the contracting officer had found that the injunction was dissolved prior to the actual commencement of work on said section. The Comptroller General also ruled that since the contracting officer had found that the causes of the other delays were not excusable under the terms of



the contract, no remission of liquidated damages in excess of \$1,900.00 could be allowed.

XI. Plaintiff, having completed performance of its contract in accordance with the terms thereof, and having been delayed in said performance through no fault of its own, but due to causes heretofore mentioned, therefore claims the balance of the contract price improperly withheld as for liquidated damages in the sum of \$3,900.00.

6 XII. No other action has been had on said claim in Congress or by any of the departments; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The plaintiff is a citizen of the United States. And the plaintiff claims \$3,900.00.

KING & KING,  
Attorneys for Plaintiff.

[Duly sworn to by John W. Gaskins; jurat omitted in printing.]

7 II. Exhibit A to petition.

(Filed August 26, 1939)

CONTRACT FOR CONSTRUCTION

This Contract, entered into this Twelfth day of October 1931 by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Brooks-Callaway Company, a corporation organized and existing under the laws of the State of Georgia, of the city of Atlanta, in the State of Georgia, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for the construction of Item R. 848, Missouri Bend Levee, Lots A, B, and C, containing approximately two million three hundred thousand (2,300,000) cubic yards, situated in the Atchafalaya Front Levee District, and Item L 868, St. Gabriel Levee, Lots A, B, and C, containing approximately one million seven hundred fifty thousand (1,750,000) cubic yards, situated in the Pontchartrain Levee District, for the consideration of Twelve (12) cents per cubic yard,

place measurement, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Engineer Department, U. S. Army, Standard Specifications for Levee Work, No. 3238, dated August 25, 1931, and drawings entitled "Item R 848, Missouri Bend Levee, File No. L-8-2280," and "Item L 868, St. Gabriel Levee, File No. L-8-2269."

The work shall be commenced as provided for in paragraph 2 of the specifications attached hereto and made a part hereof, and shall be completed within the time fixed for completion in paragraph 39 of said specifications.

**ARTICLE 2. Specifications and drawings.**—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

**ARTICLE 3. Changes.**—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than

Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 13 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.



**ARTICLE 9. Delays—Damages.**—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor

10 charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

**ARTICLE 12. Disputes.**—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the

department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 18. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

11 In witness whereof, the parties hereto have executed this contract as of the day and year first-above written.

THE UNITED STATES OF AMERICA,

By J. N. HODGES,

*Lieut. Col., Corps of Engineers, U. S. Army.*

BROOKS-CALLAWAY COMPANY,

By J. L. BROOKS,

*Vice-President,*

*1522 Healy Bldg., Atlanta, Ga.,*

*Contractor.*

TWO WITNESSES:

CARLTON Y. SMITH,

S. H. RUMPH.

ENGINEER DEPARTMENT, U. S. ARMY

STANDARD SPECIFICATIONS FOR LEVEE WORK

2. Commencement, prosecution, and completion.—The contractor will be required to commence work under the contract within 30 calendar days after the date of receipt of notice to proceed and to complete it within the time fixed for completion in paragraph 30 of these specifications.

3. Liquidated damages.—For each item of work as listed in paragraph 30 hereof, liquidated damages for delay will be at the rate of \$20.00 per day for each and every calendar day of delay beyond the time fixed for its completion.

5. Award of contract.—The right is reserved to award all the work covered by these specifications to one bidder, or to award items of work as listed in paragraph No. 30 separately or in com-

binations to two or more bidders, or to reject any or all bids, as may be for the best interest of the United States. A bid or bids may be rejected on the ground that the bidder is lacking in the necessary capital, equipment, resources, and/or experience, that he is obligated for the performance of as much work as he will probably be able to perform during the period contemplated by these specifications, or that he was unjustifiably dilatory, inattentive, and/or negligent in the performance of, or has unjustifiably defaulted on past work for the Government, or for other causes.

13. **Right of way and material.**—This agreement is made with the understanding that the right of way and earth for constructing the levee will be furnished without cost to the contractor, except as provided in paragraph 22 (b). Days upon which work is prevented by failure to provide necessary right of way will not be counted against the contractor as delay in completion of contract, nor in computing the time stipulated in paragraph 2 hereof for commencement of work; but no claim is to be made by the contractor for damage or expense occasioned by delay or failure in securing right of way. In event of failure to obtain right of way for all or any portion of the line by the time construction has progressed thereto, the contracting officer shall have the right to omit work on such line or portion of the line.

35. **Old levees, spurs, etc.**—All existing levees, parts of levees, or spurs must be left intact, unless otherwise stated in paragraph 39 and shown on the plans that they may be cut. In all cases where material in the controlling levee is used or the controlling levee line weakened or destroyed in the construction of a new levee, the work shall be so planned and executed that the new levee or a spoil bank of a net grade and section prescribed by the contracting officer but not exceeding the existing grade and section of the controlling levee, will be completed as the controlling levee is weakened or removed, in order that the work may, with the equipment or facilities available on the job, be promptly tied-in or connected with the controlling levee so as to furnish a continuous levee line for protection in an emergency. Construction plans covering the above requirements shall be submitted to the contracting officer. No method failing to provide this protection will be accepted and no material shall be removed from the controlling levee until such plans have been approved in writing by the contracting officer. These plans shall provide for a minimum number of tie-ins in an emergency. In the event that the construction of tie-in levees is required before the expiration

of the contract period prescribed in paragraph 39 hereof, payment therefor will be made by the United States as prescribed in paragraph 37. Where the method of construction jeopardizes the safety of the controlling levee, the contracting officer reserves the right to suspend the contractor's operations for any period or periods of time during the flood season that in the opinion of the contracting officer is warranted, so as to eliminate danger of overflow by unseasonable construction and no claim shall be made by the construction of tie-in levees is required before the expiration of operations or occasioned by construction difficulties on account of the building of the tie-in levees.

37. *Damage or injury to work.*—In anticipation of destructive floods during the progress of the work, the contracting officer may require a protection of timber or other material to be constructed around the ends of the levee or elsewhere, and also a temporary protective levee to be built in front of the work, upon such location and of such dimensions as he may direct. If such a protective levee is built the contractor will be paid the contract price per cubic yard; for other protective work he will be paid the actual cost plus 10 percent. All damage or injury to work, resulting from floods or other causes before the work has been accepted by the contracting officer, shall be sustained by the contractor.

39. *description of work.*—

Item	Stations	Kind of work	Cubic yards	Net height (feet)
R 348-A, Missouri Bend Levee	4188+80 to 4280+00	New and Enlargement	675,000	22-24
			85,000	23-24
Total			760,000	

14 (a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

(c) Cross-Section: The soil conditions indicate that a "B" section is required throughout. The enlargement shall be constructed on shifted centerline with a 10-foot crown, 1 on 3.5 river-

side slope and landside slope extended through the existing levee to meet the old banquette at its riverside edge as indicated in typical section on drawing. The crown of the existing levee shall be cut to conform to the landside slope of the enlargement.

(d) Placement: Riverside enlargement between stations 4188+80 and 4213+80, estimated contents 85,000 cubic yards. New levee between stations 4213+80 and 4280+00, estimated contents 675,000 cubic yards.

Item R 848-B, Missouri Bend Levee; stations, 4280+00 to 4335+00; kind of work, New; cubic yards, 770,000; net height feet, 24-28.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

15 (c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

Item R 848-C, Missouri Bend Levee; Stations 4335+00 to 4385+51=4384+00 c. s.; kind of work New; cubic yards, 770,000; net height feet 23-28.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on the map. Where the new levee ties into the Australia Point Levee, now under construction, riverside pit restrictions with reference to the land-side toe of the Australia Point Levee shall govern the depth of excavation, as indicated on the drawing.

(c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

Item L 868-A, St. Gabriel Levee; Stations 1273+16 to 1352+00; kind of work, new; cubic yards, 585,000; net height feet, 18-21.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications, and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

16 (c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

Item L 868-B, St. Gabriel Levee; Stations 1352+00 to 1428+00; kind of work, New; cubic yards, 585,000; net height feet, 18-21.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications, and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

(c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

Item L 868-C, St. Gabriel Levee; Stations 1428+00 to 1496+93=1498+72 c. s.; kind of work, New; cubic yards, 580,000; net height feet, 19-23.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

(c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

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### III. General traverse

Filed October 5, 1939

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

ETF

FRANCIS M. SHEA,  
Assistant Attorney General.

### IV. Argument and submission of case

On February 4, 1942, the case was argued and submitted on merits by Mr. George R. Shields for plaintiff, and by Mr. Newell A. Clapp for defendant.

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V. *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J., and dissent in part by Madden, J.*

Filed June 1, 1942

Mr. George R. Shields for the plaintiff. King & King were on the briefs.



Mr. Newell A. Clapp, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Gaines V. Palmes was on the briefs.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

*Special findings of fact*

1. The plaintiff is a corporation organized under the laws of the State of Georgia.

2. On October 12, 1931, plaintiff and defendant entered into a contract whereby, for the consideration of 12 cents per cubic yard, place measurement, plaintiff agreed to furnish all labor and materials, and perform all work required for the construction of Item R 848, Missouri Bend Levee, Lots A, B, and C, containing approximately 2,300,000 cubic yards, situated in the Atchafalaya Front Levee District, and Item L 868, St. Gabriel Levee, Lots A, B, and C, containing approximately 1,750,000 cubic yards, situated in the Pontchartrain Levee District, both on the Mississippi River, in accordance with specifications, schedules, and drawings made a part of the contract. The contractor was required by the contract to commence work within 20 calendar days after the date of receipt of notice to proceed, and complete it within 450 calendar days thereafter. The material for the work was to be obtained from riverside borrow pits and from the existing levee to the extent indicated on the drawings.

The right-of-way and earth for constructing the levee was to be furnished without cost to the contractor. Except for about 85,000 cubic yards of riverside enlargement of an existing levee of Item A of the Missouri Bend, the work consisted of new levee, roughly paralleling an existing levee.

3. Paragraph 35 of the specifications provided:

"35. Old levees, spurs, etc.—All existing levees, parts of levees, or spurs must be left intact, unless otherwise stated in paragraph 39 and shown on the plans that they may be cut. In all cases where material in the controlling levee is used or the controlling levee line weakened or destroyed in the construction of a new levee, the work shall be so planned and executed that the new levee or a spoil bank of a net grade and section prescribed by the contracting officer, but not exceeding the existing grade and section of the controlling levee, will be completed as the controlling levee is weakened or removed, in order that the work may, with the equipment or facilities available on the job, be promptly tied in or connected with the controlling levee so as to furnish a continuous levee line for protection in an emergency. Construction

plans covering the above requirements shall be submitted to the contracting officer. No method failing to provide this protection will be accepted and no material shall be removed from the controlling levee until such plans have been approved in writing by the contracting officer. These plans shall provide for a minimum number of tie-ins in an emergency. In the event that the construction of tie-in levees is required before the expiration of the contract period prescribed in paragraph 39 hereof, payment therefor will be made by the United States as prescribed in paragraph 37. Where the method of construction jeopardizes the safety of the controlling levee, the contracting officer reserves the right to suspend the contractor's operations for any period or periods of time during the flood season that in the opinion of the contracting officer is warranted, so as to eliminate danger of overflow by unseasonable construction and no claim shall be made by the contractor for damage or expense occasioned by such suspension of operations or occasioned by construction difficulties on account of the building of the tie-in levees.

21 4. Paragraph 37 of the specifications provided that:

In anticipation of destructive floods during the progress of the work, the contracting officer may require a \* \* \* temporary protective levee to be built in front of the work, upon such location and of such dimensions as he may direct. If such a protective levee is built the contractor will be paid the contract price per cubic yard \* \* \*.

5. Article 9 of the contract provided:

**ARTICLE 9. Delays-Damages.**—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated

damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

The contracting officer for the United States was J. N. Hodges, Lieut. Col., Corps of Engineers, United States Army.

6. Notice to proceed was given to the contractor October 22, 1931. Both jobs were due to be completed on January 14, 1933. The Missouri Bend Levee was completed on March 22, 1933, and the St. Gabriel Levee on August 25, 1933.

7. Liquidated damages of \$5,800 at \$20.00 a day for a total delay of 290 days were deducted, at which plaintiff protested. Upon consideration of this protest the contracting officer found that plaintiff had been delayed by high water during the contract period 112 days on the Missouri Bend Levee, and 4 days on the St. Gabriel Levee, and that it had been further delayed by high water after the contract period for 162 days on the St. Gabriel Levee. He held that of the total delay due to high water 183 days was the delay normally to be expected on account of high water, and that 95 days could not have been anticipated. He, therefore, recommended that liquidated damages in the sum of \$1,900 be remitted, but that the balance be retained. Settlement was made on this basis.

8. Of the \$3,900 finally deducted for liquidated damages, \$3,660 thereof was deducted for delays due to high water, which the contracting officer held could have been expected, and the balance of 12 days was delay alleged to be due to the requirement that plaintiff should start construction of the St. Gabriel Levee at the

upstream end of the construction, instead of the downstream end. This is alleged to have necessitated the building of a tie-in levee, the building of which is alleged to have caused the  
23 delay. With reference to the claim for this delay the contracting officer made the following findings:

(a) Right-of-way complications at no time during the construction of the St. Gabriel Levee interfered with the contractor's progress. Prior to commencement of operations on this job, there was some litigation over a piece of property which comprised a portion of the right-of-way on Item C. The landowner in this case threatened suit against the Pontchartrain Levee Board and obtained a preliminary injunction enjoining the Levee Board from furnishing the Government the necessary right-of-way. Upon compromise, however, the suit was dismissed and the preliminary injunction issued in connection therewith, dissolved; all prior to actual commencement of work on St. Gabriel Levee. There were existent on Item B of St. Gabriel Levee, two irrigation ditches which traversed the right-of-way, but these were filled before construction of Item B commenced, consequently no delay due to irrigation facilities could ever have impeded work on this item. The only instance which might be considered as a possible exception to the pronouncement at the first of this paragraph, and for which an equitable adjustment was arranged, was that pertaining to the cemetery on Item C. This cemetery was only partially removed. It restricted the borrow pit area in that vicinity, necessitating lengthened haulage on the material placed in the stations opposite. This material was obtained from the controlling levee. Change Order No. 1, Dated November 15, 1932, approved by the Chief of Engineers December 6, 1932, filed 3504 (New Orls, 2nd D. O.) 1067/2, increased the price to be paid on the material involved in these stations, thereby giving the contractor all consideration that could reasonably be expected in such a case. There was included in the Change Order a stipulation which specified that no additional time would be allowed because of the price modification. Additional equipment could have been installed on this job at any time during the favorable working season, moreover, in most cases it is not essential that the installation of additional equipment be conditional upon the provision of certain rights-of-way. The contractor was informed in October, 1932, [sic] shortly after award of the contract and some months prior to actual commencement of construction, that, due  
24 to right-of-way difficulties being encountered at that time, which would probably be of only short duration, he should execute the work in a certain prescribed manner—such dictation being entirely within the province of the contracting offi-

cer's authority as established in paragraph 17 of the Standard Specifications. As mentioned previously, the difficulties in question were cleared up before operations on this job were initiated.

(b) The contractor contends that he was forced to build a tie-in on St. Gabriel Levee when the job was practically complete. Paragraph 35 of the Standard Specifications invests in the contracting officer authority to order a tie-in and suspension of operations for any period of time which in his opinion is warranted. The order for the tie-in referred to was issued on January 6, 1933, reiterated on January 10, 1933, and construction on this was not begun until issuance of the second order. The contractor further contends that the tie-in was not necessary, and that the levee could have been completed before the existence of over-bank stages upon this locality. Any discretionary powers of the contractor in such instances are nonexistent as far as decisions relative to tie-in are concerned, the contracting officer having absolute authority in the matter. At the time the tie-in was ordered, the job was only 86% complete and the stage of the water on the Plaquemine gage, that in closest proximity to this work, was 15.1 feet. At the rate of progress being maintained at that time, completion could not have been effected until about March 25, 1933—exclusive of delays, which were most imminent at that time—on which date the river stage was 23.0 feet. In the interim, however, the river rose to 26.6 feet on the Plaquemine gage, a rather high stage for this period. This office is not cognizant of the matter alluded to by the contractor in his statement, "• • • and by your method of figuring there would not have been any delay on the St. Gabriel job." Neither is it cognizant of the debit of \$3,800.00 forced upon the contractor and alluded to by him in the second paragraph of the supplementary claim.

A copy of these findings was not furnished the plaintiff by the contracting officer, and in consequence no appeal was taken therefrom to the head of the department.

9. Paragraph 17 of the specifications attached to and forming a part of the contract provides:

17. Order of work.—The contracting officer shall have power to designate the exact localities at which the work shall be prosecuted; also the proportion of the force that shall be worked at any designated locality; and the time when sodding and other incidental work shall be done.

10. Plaintiff was notified by the contracting officer on October 27, 1931 to begin construction of St. Gabriel Levee at the upstream end thereof, due to the following:

Due to the inability of the Pontchartrain Levee Board to furnish a continuous right-of-way throughout the proposed area of opera-



tions under the contract, the work must be planned so as to minimize the possibility of delay occurring thereby. It is believed that the difficulty encountered will be of temporary duration and that the right-of-way will eventually be furnished.

Upon receipt of this letter plaintiff on October 30, 1931 replied as follows:

We have your letter, of Oct. 27th; we will begin operations as directed at the upstream end of the St. Gabriel Levee, Item 868-A, at Station 1273+16 and work south.

The right-of-way for the construction of lot C of the St. Gabriel Levee was obtained prior to the time that plaintiff was ready to begin work thereon.

11. Beginning on January 6, 1933 the Mississippi River in the proximity of the St. Gabriel Levee began to rise. On that date the river stage was at elevation 17.3; on January 7 it was at elevation 18.4; on January 8 it was at elevation 19.4; on January 9, at 20.4; and on January 10, at 21.4. Flood stages were predicted. On January 6 the contracting officer wired plaintiff as follows:

Re Saint Gabriel Levee you are directed to construct tie-in to controlling line beginning as near lower side of cemetery as possible. Stop. Construction of new levee from present location of machine to point of tie-in must be expedited. Stop. Cross section to be not less than that of the existing levee. Stop. Detailed instructions will be issued by area engineer.

Upon receipt of this telegram, plaintiff orally protested the order to build a tie-in levee, and requested authority to continue working along the new levee line, and thus connect the new  
26 levee with the controlling levee in lieu of building a tie-in at an angle as directed. This request was denied, and on January 10, 1933, the following telegram was sent by the contracting officer to the plaintiff:

Reference your conversation Chief Third Area St. Gabriel Levee, you are again directed to tie this levee in to controlling line as indicated in telegram dated January sixth.

No further protest against the order to construct the tie-in was made by plaintiff, and no appeal from the decision of the contracting officer was taken to the head of the department.

12. On January 10, 1933 there remained to be completed 1,484 feet of new levee, involving about 80,000 cubic yards of material. The tie-in required the construction of about 670 feet of levee, involving 27,951 cubic yards.

13. The order of the contracting officer directing the building of the tie-in levee was reasonable under the circumstances.

14. The sum of \$3,900, so withheld as liquidated damages, has not been paid to the plaintiff in whole or in part.



*Conclusion of Law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover \$3,660.00.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand six hundred sixty dollars (\$3,660.00).

*Opinion*

WHITAKER, Judge, delivered the opinion of the court:

The plaintiff sues the defendant for the amount deducted as liquidated damages for delay.

The plaintiff had a contract to build lots A, B, and C of the Missouri Bend Levee, and lots A, B, and C of the St. Gabriel Levee. Both jobs had to be completed within 450 calendar days from the date of notice to proceed. The Missouri Bend Levee was completed 67 days after the date set for completion, and the St. Gabriel Levee was completed 223 days later.

The defendant originally deducted \$5,800 for liquidated damages for a total of 290 days beyond the termination date. The plaintiff filed claim for the amount deducted. The contracting officer, in acting upon this claim, found that the plaintiff had been delayed during the contract period by high water on the Missouri Bend Levee 112 days, and on the St. Gabriel Levee 4 days, and that the normal expected delay during this period was 83 days on the Missouri Bend Levee, and 2 days on the St. Gabriel Levee, leaving 31 days delay due to high water which he held the contractor could not have foreseen. He also found that the plaintiff had been delayed by high water after the contract period 162 days on the St. Gabriel Levee, and none on the Missouri Bend Levee, and that the normal expected delay on the St. Gabriel Levee was 98 days. He held that the plaintiff was entitled to a remission of liquidated damages for the unexpected delay due to high water in the sum of \$1,900, and this sum was remitted. The defendant retains the balance of \$3,900, liquidated damages for 195 days of delay, of which 183 days was delay due to high water, which the contracting officer held the contractor should have foreseen. The balance of 12 days was delay due to other causes hereafter to be mentioned.

The plaintiff says that it is entitled to recover the amount withheld for delay due to high water whether or not it could have been foreseen.

Article 9 of the contract provides for the deduction of liquidated damages for delay, with this proviso:

Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather \* \* \*

This contractor, therefore, could not be penalized for delay due to unforeseeable causes. Among the things which  
28 are listed as unforeseeable causes are "acts of God, or of the public enemy, acts of the Government, fires, floods," etc. It, therefore, would seem to follow that no amount should have been deducted for delay due to a flood. But the defendant contends that the proviso refers only to such floods as are unforeseeable. We think this position is untenable. The proviso does not mention unforeseeable floods, unforeseeable acts of God, unforeseeable acts of the public enemy, unforeseeable acts of the Government, unforeseeable fires, etc. All these things are unforeseeable. The proviso mentions them as among the things that are unforeseeable. The only cause that is qualified is severe weather; the weather must be unusually severe. Floods are not qualified. Any flood is to be treated as an unforeseeable cause.

The construction of the word "including" is in harmony with the construction placed upon it by the courts in many cases. See *Montello Salt Co. v. Utah*, 221 U. S. 452, and many other cases cited in Vol. 20 of "Words and Phrases," page 443, et seq.

This identical proviso was so construed in *Albina Marine Iron Works, Inc. v. United States*, 79 C. Cls. 714.

.. If there is any doubt about the correctness of this construction, that doubt ought to be resolved against assessing the penalty.

The other question is whether or not high water which stopped the work is to be considered as a flood, even though it did not overflow the levee. Webster's dictionary defines a flood as "A great flow of water; a body of moving water; the flowing stream, as of a river; especially a body of water rising, swelling, and overflowing land." The word frequently signifies an overflow, but it is not restricted thereto. Here we are convinced that it should not be so restricted because it is mentioned as one of the causes of delay and, therefore, means any rise in the water which caused cessation of work and delayed the contractor in the completion of the work. Apparently the water overflowed the banks of the river, but did not overtop the levee.

Another delay for which liquidated damages were deducted was alleged to have been due to the requirement by the

29 contracting officer that the work begin at the upstream portion of the work instead of the downstream portion, as the contractor desired. This is alleged to have necessitated the building of a tie-in levee in order to take care of approaching high water. Had the work started at the down-stream end, it is alleged this would not have been necessary.

It was well within the province of the contracting officer to order the work to start at the upstream end of the construction. Paragraph 17 of the specifications reads:

17. Order of work.—The contracting officer shall have power to designate the exact localities at which the work shall be prosecuted; also the proportion of the force that shall be worked at any designated locality; and the time when sodding and other incidental work shall be done.

Moreover, when the contracting officer on October 27, 1931, directed the plaintiff to begin construction at the upstream end of the work, the plaintiff replied on October 30, 1931, agreeing to do so. No protest against the order was entered.

The plaintiff also complains that it was unnecessary to build the tie-in levee, but that it should have been permitted to continue with the construction of the main levee.

It was within the discretion of the contracting officer to order the construction of this tie-in levee. Paragraph 37 of the specifications provides in part:

In anticipation of destructive floods during the progress of the work, the contracting officer may require a . . . temporary protective levee to be built in front of the work, upon such location and of such dimensions as he may direct. If such a protective levee is built the contractor will be paid the contract price per cubic yard . . .

When the building of this tie-in levee was ordered the river was rising at the rate of about a foot a-day, and flood stages were predicted. The plaintiff believed that it could complete the construction of the levee before the flood arrived. But the contracting officer was of a different opinion, or at least thought that it would be risky to take this chance. This was a matter committed to his judgment.

Furthermore, when the plaintiff was first directed to build this tie-in levee, it orally protested and requested authority  
30 to continue working along the new levee line; but this request was refused and the plaintiff was directed to build the tie-in levee as ordered. Thereupon, plaintiff proceeded to build it without further protest, and without any appeal to the head of the department. Under such circumstances the plaintiff cannot complain here of the order of the contracting officer.

Plaintiff is entitled to recover of the defendant liquidated damages deducted for the 183 days it was delayed by high water, or a total of \$3,660.00. It is so ordered.

JONES, Judge; LITTLETON, Judge; and WHALEY, Chief Justice, concur.

MADDEN, Judge, dissenting in part:

Plaintiff claims the right to an extension of the time of performance of the contract for the number of days that it was delayed by high water which made work on the project impossible, even though such high water and the greater part of its duration was normal, seasonal, and anticipated. Plaintiff bases this argument upon the following portion of Article 9 of the contract:

Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: \* \* \*

I think plaintiff's interpretation of this provision is not tenable. The whole purpose of the proviso is to prevent contractors from being penalized by forfeiture of their contracts or by the assessment of liquidated damages because they encounter unanticipated obstacles to prompt performance. The proviso is advantageous to the Government also because it enables bidders to submit bids based, so far as the perils of forfeiture and liquidated damages are concerned, on normal and foreseeable events, rather than upon events which might occur, although they probably will not. In accordance with this purpose, and with the normal meaning of

the words in the sequence in which they are here found, the events listed under the "including" phrase must each be intended to be unforeseeable. Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. The contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty. A quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there would be no possible reason why the contractor, who of course anticipated these obstacles in his estimate of time and cost, should have his time extended because of them.

The same is true of high water or "floods." The normally expected high water in a stream over the course of a year, being foreseeable, is not an "unforeseeable" cause of delay. Here plaintiff's vice-president testified that in making its bid plaintiff took into consideration the fact that there would be high water and that when there was, work on the levee would stop. Without this testimony we would have known that plaintiff did so. Its time was extended, in the contract, for normal and foreseeable high water. There is no reason why we should grant a further extension of the same number of days for the same cause. Allowance should be made, as was done by the contracting officer, only for the number of days of unforeseeable high water.

I do not regard the provision for an agreed sum as liquidated damages for non-completion of the work at the time set by the contract as penal in its nature, so as to justify a forced interpretation of the language of the contract, leaving the defendant without remedy for the breach of the contract, according to its normal meaning.

33

#### VI. Judgment

At a Court of Claims held in the City of Washington on the 1st day of June A. D. 1942, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand six hundred sixty dollars (\$3,660.00).

35 [Clerk's certificate to foregoing transcript omitted in printing.]

## Supreme Court of the United States

No. 366, October Term, 1942

*Order allowing certiorari*

Filed October 19, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted and the case is transferred to the summary docket. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.